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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ARTHUR ALVAREZ III, Plaintiff and Appellant, v. CITY OF LOS ANGELES et al., Defendants and Respondents.	B166702 (Los Angeles County Super. Ct. No. BS075084)

APPEAL from a judgment of the Superior Court of Los Angeles County. David P. Yaffe, Judge. Affirmed.

Silver, Hadden & Silver, Susan Silver and Elizabeth Silver Tourgeman for Plaintiff and Appellant.

Rockard J. Delgadillo, City Attorney, Mark Francis Burton, Senior Assistant City Attorney, and Gregory P. Orland, Deputy City Attorney, for Defendants and Respondents.

A police officer appeals from a judgment denying his petition for a writ of administrative mandate. In his petition the police officer sought to reverse a board of rights' recommendation he be terminated. He claims the board lacked jurisdiction to amend the charge against him after the trial court in a prior mandate proceeding found insufficient evidence to support the initial charge against him, vacated his termination, and remanded without specific directions to take any particular action. In addition, the police officer contends, even if the trial court intended to remand for further consideration, the amendment was improper in this case because it occurred outside the statute of limitation, and even if the new charge related back to the date of the original invalid charge, the doctrine of laches barred further prosecution of the matter. Additionally, the police officer argues denial of his *Pitchess*[1] motion deprived him of a fair trial at the reconvened board of rights hearing, the penalty of termination was excessive based on the single, amended charge, and he is entitled to back pay from the date of his original termination to the date he was reinstated after the trial court vacated the board of rights' initial decision and remanded for further proceedings. We find no error. Accordingly, we affirm.

FACTS AND PROCEEDINGS BELOW

Appellant, Arthur Alvarez III, had been an officer with the Los Angeles Police Department for 11 years. For many years, Alvarez performed his duties in an exemplary manner, regardless of assignment. Alvarez received numerous commendations and promotions and reached the rank of sergeant.

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[1] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

In 1996 he was working as a sergeant in the Southwest Division. During this time he had inappropriate dating relationships with two subordinate probationary officers, Officer Shannon Reece and Officer Victoria Diaz. Because social or personal relationships between officers create the potential for conflicts of interest they are discouraged by the Los Angeles Police Department (department). This is especially true if the relationship is between a superior and a subordinate officer. Failure to report such a relationship to a commanding officer constitutes a violation of department policy.

Officer Reece was terminated during her probationary period for failing to perform. Officer Reece requested an administrative appeal of the termination decision. Alvarez testified at Reece's so-called "liberty interest" hearing on November 12, 1996. During his testimony he denied having a dating relationship with Reece. Alvarez also denied having a dating relationship with Officer Diaz.

Alvarez telephoned Diaz at work shortly after his testimony. Alvarez asked Diaz if she had also been subpoenaed to testify at Reece's liberty interest hearing. Diaz confirmed she had indeed received a subpoena. Alvarez asked Diaz what she planned to say. Diaz replied she was going to tell the truth and say they had had a seven-month dating relationship while working together at the Southwest Division. Alvarez told Diaz if she said they had been dating he would be in trouble. Alvarez said he really needed a friend right then. Alvarez reminded Diaz she had told him she would never do anything to hurt him. Alvarez spoke to Diaz on three separate occasions before her scheduled testimony.

Diaz testified at Reece's liberty interest hearing on November 26, 1996. She admitted she had had a dating relationship with then Sergeant Alvarez during her probationary period. The department advocate asked Diaz whether Alvarez had talked to her about the testimony she would be giving at Reece's hearing. Diaz replied, "Yes, I told him I was subpoenaed here. He had called me at the station and asked me." The department advocate asked Diaz whether Alvarez asked Diaz to testify any particular

way. Diaz replied, "No. I told him I was going to tell the truth. That's it." Diaz explained Alvarez had called her several times prior to her scheduled testimony. The department advocate asked if, "[a]t any time did he try to influence you in any way?" Diaz answered, "No."

Later, Diaz explained she testified Alvarez had not tried to influence her testimony because he had not directly asked her to lie.

Diaz became the subject of an internal affairs investigation based on her confession during the Reece hearing of an improper dating relationship with Alvarez. She was interviewed by internal affairs on January 14, 1997. Diaz told internal affairs personnel Alvarez had in fact attempted to influence her testimony at the Reece hearing. According to Diaz, she had been in love with Alvarez and, although they had since broken up, she still had strong feelings for him at the time of the Reece hearing. However, by the time of the internal affairs hearing, several months had elapsed and she no longer felt as emotionally attached to him. Diaz testified as she became more objective she began to see Alvarez's statements "for what they were." She testified her perception now was Alvarez's comments to her about needing a friend, stating if she revealed their relationship he would get in trouble, and reminding her about her earlier statement she would do nothing to hurt him, were subtle efforts by Alvarez to get her to lie about their relationship.

Alvarez was charged with eight accusations based on evidence of misconduct revealed during the Reece hearing. He was suspended without pay. Seven of these accusations were dismissed because they were not charged within one year after discovery of the misconduct as mandated by the Los Angeles City Charter.[2] A single count remained. This count alleged: "During November 1996, you committed subornation of perjury when you contacted Officer V. Diaz and tried to influence her testimony at an administrative appeal hearing."

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[2] Los Angeles City Charter section 202, now section 1070.

Alvarez's administrative hearing before a board of rights (Board) occurred on February 24 and 27, 1998. Alvarez denied he had had a dating relationship with Diaz. As he explained it, when he telephoned Diaz he told her they had been friends, he told her they had had a social relationship, but not a dating relationship. Alvarez described a "dating" relationship as an exclusive, committed relationship. Alvarez acknowledged Diaz had wanted such a commitment but explained he did not agree and therefore their "social" relationship never evolved into a "dating" relationship in his mind. Alvarez felt he did not need to report anything to his commanding officer because he saw nothing improper with their relationship.

Alvarez was impeached with his testimony from a prior hearing at which he admitted he had had a dating relationship with Diaz.

Alvarez also denied he had tried to influence Diaz's testimony. He denied reminding her in their telephone conversation she had promised never to do anything to hurt him. He testified he did not remember mentioning he could get into trouble if Diaz revealed they had been dating.

Board member Captain Voge questioned Alvarez further regarding his belief his relationship with Officer Diaz was not improper. Alvarez explained he did not consider activities such as going to social events, going to a bar for drinks, going out to dinner, going to a movie or calling each other and/or "hanging out," anything more than what is normally done with any type of friend in a social relationship. Alvarez explained no one accused him of having an improper dating relationship when he did these sorts of activities with his male officer friends. On further questioning by Captain Voge, Alvarez admitted he and Diaz had held hands and kissed, and further admitted he would not likely kiss a male officer.

Board Chairman Captain O'Connell reminded Alvarez the department policy manual said nothing about "dating" relationships, but warned against all personal or financial relationships between officers as posing the greatest risks for conflicts of interest. Captain O'Connell also pointed out the policy manual warned the risk for

actual or apparent conflict "is particularly acute for superiors and subordinates by rank or pay grade within the same chain of command."

At the conclusion of the hearing, Alvarez argued the allegation against him should be dismissed for failure to prove the willfulness element of the charge of subornation of perjury under Penal Code section 127.[3] Alvarez also argued he should be found not guilty because Diaz testified at the Reece hearing she had not been influenced by anything he had said. The department advocate disagreed. In closing arguments the department advocate asserted (albeit erroneously), "[w]hether or not [Alvarez's] statements to [Diaz] prior to her testifying had an impact on her subsequent testimony is irrelevant, because it is not an element of the charge of subornation of perjury."

The Board found Alvarez guilty of the charge. Board Chairman Captain O'Connell explained the Board's decision. He described the misconduct as follows: "Alvarez's contact with Diaz after his testimony and prior to her testimony at the liberty interest hearing, which was under oath, along with his statements to Diaz were improper and were an obvious attempt to influence her testimony to a fact regarding the relationship that she knew to be false. Therefore, the board has unanimously found that you, Officer Alvarez, are guilty of count I."

Based on the current evidence of misconduct and the evidence of prior sustained charges of misconduct similarly involving dishonesty, the Board recommended to respondent, then Chief of Police Bernard C. Parks, Alvarez be removed as a police officer.

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[3] Penal Code section 127 defines the crime of subornation of perjury. This section provides: "Every person who willfully procures another person to commit perjury is guilty of subornation of perjury, and is punishable in the same manner as he would be if personally guilty of the perjury so procured."

On April 29, 1998, Alvarez filed a petition for writ of mandate pursuant to Code of Civil Procedure sections 1085 and 1094.5. For the first time Alvarez argued the subornation of perjury charge had not been proved because there was no evidence Diaz had committed perjury. In response, respondent, the City of Los Angeles (City), conceded there was no evidence of perjury to sustain the charge of subornation of perjury. The City acknowledged it had made an error of law in its accusation and urged the court to remand the matter to permit the City to amend the allegation to conform to the proof admitted before the Board.

On April 22, 1999, the trial court granted Alvarez's petition. The minute order for the day states, "The petition is therefore granted and the matter is remanded to respondent Chief of Police with directions to vacate his decision terminating [Alvarez's] employment as a police officer. [¶] The parties are in disagreement as to whether, upon remand, respondent can lawfully discipline [Alvarez] for soliciting subornation of perjury. The court expresses no opinion with respect to said issue because it is not ripe for judicial review. The contentions of the parties with respect to said issue should first be made at the administrative level. This court may not assume respondent Chief of Police will abuse his discretion in deciding the issue. . . . "

Alvarez prepared a proposed judgment for the court's signature. The court retained the language in the proposed judgment which stated, "Respondents must set aside their decision . . . to terminate [Alvarez]." However, the court struck the language in the proposed judgment which stated, "and reinstate [Alvarez] as a peace officer with the City of Los Angeles in the rank of Police Officer III with full back pay, seniority, and benefits, with interest as permitted by law."

Alvarez appealed from the judgment, contending the court committed legal error by remanding the matter without ordering he be reinstated with full back pay. The Court of Appeal held the trial court correctly found the issue whether Alvarez remained subject to discipline was not ripe for review. The court further found the

appeal premature, declined to reach the merits of the issues presented, and affirmed the judgment of the trial court.[4]

In the meantime, on November 17, 1999, then Chief of Police Bernard Parks signed an order simultaneously reinstating Alvarez and suspending him "pending a hearing and decision by a reconvened Board of Rights."

The Board reconvened with one new member on August 13, 2001. Alvarez moved for a directed verdict. He argued (1) the Board lost jurisdiction to amend the charge because it had already rendered a final decision; (2) a new amended charge at this late date violated the one year limitation periods in Los Angeles City Charter section 202; (3) the new amended charge violated his right to due process; (4) the new amended charge years after the alleged misconduct occurred was barred by administrative laches; and (5) he was not guilty of the charge, had been reinstated, and was thus entitled to back pay and lost benefits.

The Board rejected Alvarez's various claims and denied his motion for directed verdict. The Board also noted it had no jurisdiction to rule on his claim for back pay and benefits and suggested his department representative could direct him to the proper agency to address this issue.

Thereafter, then Chief of Police Bernard Parks filed an amended charge which read: "During November, 1996, you attempted to influence a subordinate officer, Officer Diaz, to testify falsely at an administrative hearing regarding your relationship with her while you were both assigned at Southwest Division."

The hearing before the reconvened Board was continued for several months to prepare and to review the transcripts from the prior hearing.

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[4] *Alvarez v. City of Los Angeles* (Nov. 1, 2000, B133925 [nonpub. opn.].)

Officer Diaz was the only witness to testify at the December 18, 2001, reconvened Board. Alvarez again moved for a directed verdict prior to Diaz's testimony. Alvarez also "filed" a *Pitchess* motion with a request the Board review Officer Diaz's personnel file for any matters which might have a bearing on her credibility as a witness. Ultimately, the Board denied both motions.

The Board rendered its decision after hearing Diaz's testimony. The Board unanimously found Alvarez guilty of attempting to influence Officer Diaz to testify falsely at the administrative hearing. Captain Voge, speaking as chairman of the reconvened Board, stated, "Officer Diaz testified before this board yesterday, and the board found her testimony to be particularly credible. The Board noted that her testimony was consistent with her testimony before the board of rights as it was originally constituted. Although she indicated that at no time did you tell her to lie or be untruthful, the board has concluded that you attempted to coach her and influence her to testify falsely by pointing out the consequences of candid and truthful testimony regarding your improper relationship. [¶] Officer Alvarez, since you did not testify before this board of rights as it's presently constituted, the board relied on your previous testimony before the original board of rights. This board did not find your previous testimony to be credible. . . . " Captain Voge pointed out several examples of Alvarez's prior testimony which the Board found to be unworthy of belief. Captain Voge concluded, "In summary upon weighing all the evidence and the credibility of the witnesses, the board has concluded that you had the motive to influence Officer Diaz's testimony and took advantage of your superior-subordinate relationship over Officer Diaz in an attempt to dissuade her from telling the truth before the liberty interest hearing. This type of conduct cannot be tolerated by the department."

The Board considered Alvarez's entire history with the department in the penalty phase of the hearing, but excluded consideration of the seven dismissed counts. The Board noted his history included a prior board hearing for being a major participant in an endless chain pyramid scheme and for involving other officers in the

scheme. The prior Board also involved a charge of an improper personal and business relationship with yet another subordinate female officer. According to the prior Board's findings, Alvarez had been dishonest in his testimony regarding his alleged involvement. Alvarez was demoted as a result of his prior misconduct. The present Board expressed concern whether Alvarez had learned any lesson from his prior discipline because the evidence showed his pattern of dishonesty continued. Captain Voge, again speaking for the Board, told Alvarez, "Although you are no longer a supervisor, this board fully agrees with the sentiments expressed by your prior board members. The law enforcement code of ethics states that the public demands integrity of a law enforcement officer and dishonesty may impair public confidence and cast suspicion upon the entire department. [¶] We have experienced in you what all the board members believe was a significant lack of discretion, false denials, selective memory, and a lack of basic honesty. We don't believe you possess the characteristics of a police officer. Therefore, this board will recommend to the chief of police that you be removed from your position as a police officer."

Alvarez filed a second petition for an administrative writ of mandate. He argued the weight of the evidence did not support the Board's finding of misconduct; denial of his *Pitchess* motion deprived him of the opportunity to challenge Diaz's credibility, as did the loss of a tape recording of her testimony at her internal affairs interview; the Board had no jurisdiction to amend the charge after it had already issued a final decision; the improper amendment of the charge violated various statutes of limitation; the new charge was barred by administrative laches; the penalty of termination was excessive; and he was entitled to back pay and benefits upon his reinstatement.

The court found the weight of the evidence supported the finding of misconduct and rejected Alvarez's other contentions. This appeal followed.

DISCUSSION

I. STANDARD OF REVIEW OF AN ADMINISTRATIVE DECISION.

"In exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence."[5] On appeal, we review the trial court's determination for substantial evidence.[6] However, the trial court's legal conclusions are subject to this court's independent review for error.[7]

II. THE RECONVENED BOARD HAD JURISDICTION TO CONSIDER THE AMENDED CHARGE.

Alvarez contends the Board lost jurisdiction to hear the amended charge against him because the Board had already rendered its final decision. In support of his argument Alvarez relies on the decision in *Heap v. City of Los Angeles*.[8] This decision is not on point. In *Heap*, the Supreme Court held it was improper for the Civil Service Commission to reconsider and rescind a former employment decision after it had already rendered a final decision in the matter. The court noted the city charter did not grant the Civil Service Commission authority, nor provide the procedural vehicles, to rehear final decisions. Under the city charter as it then existed, the commission's authority was limited to investigating and reviewing employment actions. Under the charter, its decisions became final once forwarded to the appointing authority.[9]

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5 *Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817.

6 *Fukuda v. City of Angels, supra*, 20 Cal.4th 805, 825.

7 *Gai v. City of Selma* (1998) 68 Cal.App.4th 213, 219.

8 *Heap v. City of Los Angeles* (1936) 6 Cal.2d 405.

9 *Heap v. City of Los Angeles, supra,* 6 Cal.2d 405, 407.

In this case, by contrast, the Board did not reconsider a final decision. The Board's initial decision was not final because Alvarez sought review of the decision, first in the trial court and then in the Court of Appeal. Moreover, the result of this review was to vacate, or set aside, the Board's "final" decision, which left the Board nothing to "reconsider" on remand.

When an administrative decision is reversed, either for procedural irregularities or for insufficiency of the evidence, as in this case, the matter again becomes "at large."[10] "'The proceeding [after reversal] is left where it stood before the judgment or order was made, and the parties stand in the same position as if no such judgment or order had ever been rendered or made. They have the same rights which they originally had.'"[11] Because the first decision was a nullity, the Board necessarily could not, and did not, reconsider its earlier decision on remand, but was instead required to begin anew.

Next Alvarez contends the Board lacked jurisdiction to try the amended charge because the trial court in the first mandamus proceeding did not remand with specific directions either to file an amended charge or to reconvene the Board.

Code of Civil Procedure section 1094.5, subdivision (f) describes the actions a trial court may take after a review of an administrative decision. This subdivision provides: "The court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in the light of the court's opinion and judgment and may order respondent to take such further

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[10] *Steen v. City of Los Angeles* (1948) 31 Cal.2d 542, 547.

[11] *Steen v. City of Los Angeles, supra*, 31 Cal.2d 542, 547, quoting 2 Cal. Jur. 996; see also, *Kumar v. National Medical Enterprises, Inc*. (1990) 218 Cal.App.3d 1050, 1055 ["Because the trial court set aside that decision and remanded the matter for further proceedings in accordance with Hospital's Bylaws, appellant must again proceed to a final administrative decision by the Board before seeking redress in the courts."].

action as is specially enjoined upon it by law, but the judgment shall not limit or control in any way the discretion legally vested in the respondent."

It is true the court in the first mandamus proceeding did not order the Board to take any specific action on remand. However, Alvarez does not cite, and we are not aware of any, authority which precludes an administrative action on remand in the absence of explicit direction from the trial court. Indeed, the opposite is generally true. As Code of Civil Procedure section 1094.5, subdivision (f) makes clear, if the court sets aside the decision and remands the matter to the administrative agency, its judgment may not "limit or control in any way the discretion legally vested in the respondent."[12]

In any event, the trial court's intent to place the case at large on remand is apparent from the trial court's various statements. In its minute order from the first mandamus proceeding, the court noted the parties requested express direction but the court declined their invitation to restrict the chief of police's discretion on remand. The court stated, "The court expresses no opinion with respect to said issue because it is not ripe for judicial review. The contentions of the parties with respect to said issue should first be made at the administrative level. This court may not assume respondent Chief of Police will abuse his discretion in deciding the issue. . . . " In the present mandamus proceeding the court stated, "[Alvarez] also contends that, 'The Board of Rights had no jurisdiction to amend the charge' after it rendered a 'final decision.' . . . The contention has no merit because the administrative decision did not become final at the time the amendment was made because [Alvarez] obtained judicial review of the decision by seeking and obtaining a petition for writ of mandate from this court. This court granted the petition and remanded the matter to the Board. The result of such remand was that the previous decision of the Board, which [Alvarez] regards as 'final,' was vacated by order of this court. The matter was back before the

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[12] Code of Civil Procedure section 1094.5, subdivision (f).

Board with no restrictions upon its right to conduct further proceedings or its right to permit the charge against [Alvarez] to be amended. . . . "

Next Alvarez claims the Board lacked jurisdiction to recommend an amended charge any time after the first hearing concluded. He relies on section 345.3 of the Board of Rights manual which addresses the issue of amendments to complaints during hearings before the Board. This section is entitled "Offense Relative To Original Charge" and provides: "If, during the course of a hearing, evidence is disclosed against the accused in proof of any offense relative to the original charges but not included therein, or if it is determined that a material fact has been improperly stated on the original charge, the Board of Rights should request the Chief of Police to amend such charges so as to include specifications embodying such offense, which will then become a part of said original charges. The accused must be allowed reasonable opportunity, if needed and desired, to prepare a defense for such amended charges, and the hearing shall be continued for that purpose."[13]

Alvarez argues this section authorizes amendments strictly "during the course of a hearing." He points out this section does not provide authority for an amendment at a reconvened Board, or at any other time, after a Board has already issued a decision. Accordingly, he argues because the amendment was not made in the "course of the hearing" the Board lost jurisdiction and its power to amend the charge once it issued its initial and final decision.

This provision is not on point. It does not address the issue in the case at bar of the propriety of an amendment to a charge after a Board's final decision has been vacated by a court for insufficient evidence and remanded to the Board for further proceedings. As a general rule under existing law governing administrative actions, if a hearing has been improperly denied, or the evidence is insufficient to sustain the

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[13] See the discussion in *Taylor v. City of Los Angeles* (1997) 60 Cal.App.4th 611, upholding the propriety of the provision permitting amendments to charges during a disciplinary hearing to conform to the proof adduced at the hearing.

action of the agency, as in this case—and it is still possible for the agency to hold a hearing or exercise its discretion—then the matter should be remanded to the agency for further consideration.[14] This further consideration may include, if necessary, an amendment of the charges.[15]

In the present case there was no evidence perjury occurred and thus the initial charge could not be sustained. However, the record contained ample evidence Alvarez had attempted to influence Officer Diaz to testify falsely. This evidence of Alvarez's attempt to influence Officer Diaz to testify falsely was based on the same incident, same witnesses, as well as the same evidence produced to prove the previous charge. Given this record evidence of misconduct, it was thus possible for the department to exercise its discretion to file an amended charge based on the identical evidence adduced at the initial hearing. In these circumstances, and despite the insufficiency of the evidence to support the initial charge of subornation of perjury, the Board on

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[14] See, e.g., *Fascination, Inc. v. Hoover* (1952) 39 Cal.2d 260, 268 ["it is settled where determinative powers are vested in a local administrative agency and the court finds its decision lacks evidentiary basis, a hearing was denied or it was otherwise erroneous, it is proper procedure to remand the matter to the agency for further and proper proceedings rather than for the court to decide the matter on the merits."]; *La Prade v. Department of Water and Power of the City of Los Angeles* (1945) 27 Cal.2d 47, 53 ["If a hearing has been denied or the evidence is insufficient to sustain the action of the board, and it is still possible for the board to hold a hearing or exercise its discretion, then the matter should be remanded to the board for further consideration rather than having a trial de novo in the superior court and requiring that court to exercise independent judgment on the facts which should be determined by the board."]; *Carlton v. Department of Motor Vehicles* (1988) 203 Cal.App.3d 1428, 1434 ["Where an administrative decision is set aside for insufficiency of the evidence it is customary to remand the matter to the agency for a new hearing . . . except in the rare case where as a matter of law no evidence could support the agency's decision."].

[15] See *Rinaldo v. Board of Medical Examiners* (1932) 123 Cal.App. 712, 718 [after reversal for insufficient evidence, it was proper for the board to file a new complaint which covered the same allegations as the first complaint, and which also included an additional cause of action, because the new charge adequately related to the overall charge of unprofessional conduct].

remand regained jurisdiction to exercise its discretion to decide whether to recommend an amended charge be filed against Alvarez based on this same evidence.[16]

Thus, under existing decisional law governing administrative actions, the order remanding the matter permitted the Board to proceed against Alvarez on an amended charge regarding the same incident as the former charge.

On the other hand, where there is no evidence as a matter of law to support the agency's decision, a remand order to reconsider the case is unnecessary, if not improper.[17] The decisions Alvarez relies on are of this type.[18] These decisions are, however, inapposite. In the present case, there was abundant evidence of misconduct

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[16] See, e.g., *Berlin v. McMahon* (1994) 26 Cal.App.4th 66, 76 [jurisdiction was restored to the Department of Social Services once the court vacated the department's decision and remanded for additional evidence and further findings]; *English v. City of Long Beach* (1950) 35 Cal.2d 155, 160 ["The fact that the board has heard and decided the matter does not preclude another hearing even though the charter does not provide for a rehearing, and the board cannot be said to have exhausted its power to act until it has given English a fair hearing."].

[17] *Carlton v. Department of Motor Vehicles, supra*, 203 Cal.App.3d 1428, 1434.

[18] *Brown v. State Personnel Bd*. (1985) 166 Cal.App.3d 1151 [all but one charge of sexual harassment was time barred and single remaining charge could not prove a "pattern" of misconduct as charged; thus, the termination decision was reversed with directions to grant the relief the professor sought because the Education Code limited the personnel board's authority to act on only those allegations listed in the charging document and deprived it of the authority to add new charges or to amend the charging document]; *Newman v. State Personnel Bd.* (1992) 10 Cal.App.4th 41 [all available evidence on the subject was insufficient as a matter of law to show California Highway Patrol officer was medically disabled at the time she was terminated; it was thus unnecessary to remand the matter for further proceedings to review her capability to work]; *Levingston v. Retirement Bd.* (1995) 38 Cal.App.4th 996 [because the case only involved a yes or no question, the court, in its independent review of the administrative record, could itself determine whether the weight of the evidence proved the employee's medical condition qualified her for a disability retirement; therefore remand was not necessary]; *Edgerton v. State Personnel Bd*. (2000) 83 Cal.App.4th 1350 [the agency failed to prove the chain of title of a urine sample; accordingly its decision to terminate the employee had to be reversed because there was no evidence the urine which tested positive for methamphetamine was his].

which in turn made it possible for the Board to exercise its discretion to decide to recommend the charge be amended to conform to proof and to thereafter conduct a proper proceeding on remand.[19] Furthermore, Alvarez was afforded ample notice of the amendment and a full opportunity to respond to the revised charge.

III. THE AMENDED CHARGE WAS NOT TIME BARRED.

To recall, the Los Angeles City Charter contains a provision specifying a one-year statute of limitation after discovery of the alleged misconduct to file an accusation against a tenured police officer.[20] Similarly, the Public Safety Officers Procedural Bill of Rights outlined in the Government Code also provides a one-year limitation period after discovery of misconduct for taking punitive action against a public safety officer.[21]

Alvarez claims these one-year limitation periods barred the amended charge. As he argued before the Board, Alvarez claims these one-year statutes of limitation barred even the original subornation of perjury charge. He points out Diaz gave her testimony at Reece's liberty interest hearing on November 26, 1996, and he was not charged until more than a year later on January 14, 1998.

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[19] *Steen v. City of Los Angeles, supra*, 31 Cal.2d 542, 546 ["the determination of the issues should first be made by the administrative agency. It is given jurisdiction for this purpose, and interference with that jurisdiction should not be permitted until it has been pursued to the point of exhaustion."].

[20] Formerly Los Angeles City Charter section 202, now section 1070.

[21] Government Code section 3304, subdivision (d) provides in pertinent part: "no punitive action, . . . shall be undertaken for any act, omission, or other allegation of misconduct if the investigation of the allegation is not completed within one year of the public agency's discovery by a person authorized to initiate an investigation of the allegation of an act, omission, or other misconduct. . . . In the event that the public agency determines that discipline may be taken, it shall complete its investigation and notify the public safety officer of its proposed disciplinary action within that year," with certain exceptions not applicable in this case.

However, at Reece's liberty interest hearing Diaz testified Alvarez had *not* said anything to try to influence her testimony. It was not until her internal affairs interview on January 14, 1997, the department learned for the first time Alvarez had in fact made numerous comments to Diaz in an attempt to encourage her to deny they had engaged in an improper dating relationship. Alvarez was charged a year to the date after the department's discovery of his misconduct. Accordingly, the original accusation was timely filed in compliance with City Charter section 202 and Government Code section 3304.

Next Alvarez asserts the amended charge was "an entirely new accusation." Accordingly, he argues, the new charge did not relate back to the filing of the original charge and is barred by the one-year statutes of limitation. Alvarez's argument is not supported by the record facts. At the first Board Alvarez's defense representative even described the issue to be tried as: "Did Officer Alvarez try to influence the testimony of Officer Victoria Diaz in any way[?]" (Board 1, page 21.) In rendering judgment at the conclusion of the first Board, the chairman of the Board also referred to the charged misconduct as attempting to influence Officer Diaz to testify falsely. The chairman stated, "Alvarez's contact with Diaz after his testimony and prior to her testimony at the liberty interest hearing, which was under oath, along with his statements to Diaz were improper and were an obvious attempt to influence her testimony to a fact regarding the relationship that she knew to be false."

The amendment at issue in this case changing the charge of subornation of perjury to attempting to influence Diaz to testify falsely was based on the same evidence, the same testimony and the identical incident. Given the identical factual foundation for both charges, the amended charge cannot be considered a "new" charge

at all. Thus, in these circumstances, the amendment related back to the filing of the initial accusation.[22]

The statutes of limitation are inapplicable to the circumstances of this case in any event. Each provides a one-year time frame for filing an *initial* accusation after discovery of alleged misconduct. They do not purport to control the situation in the case at bar, namely, the propriety of filing an amended accusation to conform to proof once a matter is remanded to the Board without restriction on how to exercise its discretion regarding further proceedings in the matter. Accordingly, these statutes of limitation do not bar the amended charge in this case.

Nevertheless, Alvarez argues his "reinstatement" after the trial court set aside the Board's initial recommendation of termination ended the disciplinary proceedings for all practical purposes. He claims the "new" hearing on the amended charge before the reconvened Board constituted an entirely "new proceeding," and was thus barred by the one-year limitation periods of City Charter section 202 and Government Code section 3304.

His argument is not well taken. As noted, when an administrative decision is reversed for insufficient evidence, as in this case, the proper disposition usually is to remand the matter to the administrative agency for further proceedings. On remand after reversal, the matter "is left where it stood before the judgment or order was made, and the parties stand in the same position as if no such judgment or order had ever

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[22] See, e.g., *Norgart v. Upjohn Co*. (1999) 21 Cal.4th 383, 408-409 ["The relation-back doctrine requires that the amended complaint must (1) rest on the *same general set of facts*, (2) involve the *same injury*, and (3) refer to the *same instrumentality*, as the original one."]; *Dudley v. Department of Transportation* (2001) 90 Cal.App.4th 255, 266 [""The "relation-back" doctrine focuses on factual similarity rather than rights or obligations arising from the facts, and permits added causes of action to relate back to the initial complaint so long as they arise factually from the same injury. . . . A new cause of action rests upon the same set of facts when it involves the same accident and the same offending instrumentality.'" Quoting *Goldman v. Wilsey Foods, Inc*. (1989) 216 Cal.App.3d 1085, 1094].

been rendered or made."[23] In this case the Department reinstated Alvarez simply to restore the status quo ante in preparation for the reconvened Board. In other words, reinstatement in this case was simply a procedural device employed (and apparently required) to restore jurisdiction to the Board on remand.[24] Thus, instead of the reinstatement having the effect of concluding the prior proceeding, it had the opposite effect of permitting the reconvened Board to continue the proceedings.

To recall, administrative proceedings are not concluded until an administrative agency has "exhausted its power to act."[25] In the present case these disciplinary proceedings continued until the Board had exhausted its power to act by reconvening and reconsidering the merits of his suspension on remand.[26] Thus, contrary to his argument, Alvarez's reinstatement did not make the amended charge in the reconvened Board a new proceeding, time barred under the one-year limitation periods.

Alvarez's laches argument fares no better. He contends the years of delay in filing the amended charge against him after the Board's first decision was set aside is so substantial, administrative laches operates to bar the amended charge.[27] We cannot

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[23] *Steen v. City of Los Angeles, supra*, 31 Cal.2d 542, 547.

[24] See, e.g., *Crupi v. City of Los Angeles* (1990) 219 Cal.App.3d 1111, 1116 [officer suspended without pay was reinstated by chief of police in preparation for a hearing before a board of rights]; *Carlton v. Department of Motor Vehicles, supra,* 203 Cal.App.3d 1428, 1435 [the DMV was ordered to reinstate Carlton's probationary status pending further proceedings as the DMV may choose to initiate].)

[25] *English v. City of Long Beach, supra*, 35 Cal.2d 155, 160; see also, *Kumar v. National Medical Enterprises, Inc*., *supra*, 218 Cal.App.3d 1050, 1056.

[26] *English v. City of Long Beach, supra*, 35 Cal.2d 155, 160 [officer deprived of a fair hearing had been erroneously reinstated. The proper remedy was instead to remand to the board for a new hearing because the board had not exhausted its power to act].

[27] Citing *Brown v. State Personnel Bd., supra*, 166 Cal.App.3d 1151, 1158-1163 [unreasonable delay in investigating allegations of sexual harassment and in bringing charges against the professor worked a sufficient prejudice to transform the delay into the bar of laches]; *Fountain Valley Regional Hospital & Medical Center v. Bonta* (1999) 75 Cal.App.4th 316 [prejudice was presumed because the state agency waited

agree. Alvarez was himself the cause of the Board's delay in filing the amended charge. After the Board's initial decision, Alvarez sought judicial review in the trial court. Because the trial court declined to order his reinstatement and further declined any comment on Alvarez's entitlement to back pay, Alvarez sought review of the trial court's decision in the Court of Appeal. The time spent pursuing review of a decision "is not computed in ascertaining what is a reasonable time for prosecuting a proceeding."[28] Accordingly, the Board cannot be held responsible for the time consumed while Alvarez pursued his remedies of appeal.

In sum, Alvarez's arguments the amended charge was time barred are not well taken.

IV. ALVAREZ WAS NOT DENIED A FAIR HEARING AT THE SECOND BOARD.

Alvarez asserts he was denied a fair hearing before the second Board, claiming he was deprived of the opportunity to impeach Diaz's credibility. He complains because the actual tape recording of Diaz's internal affairs interview had been lost prior to the second Board. He further asserts error in the Board's decision to deny his *Pitchess* motion which sought to discover Diaz's personnel records for possible impeachment purposes.

His bare assertions of error are inadequate to properly present these issues for appellate review. "'This court is not required to discuss or consider points which are not argued or which are not supported by citation to authorities or the record.'"[29]

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more than 10 years before seeking reimbursement for MediCal payments allegedly improperly calculated].

[28] *Steen v. City of Los Angeles, supra*, 31 Cal.2d 542, 548.

[29] *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979, quoting *MST Farms v. C.G. 1464* (1988) 204 Cal.App.3d 304, 305.

In any event, we find no error. Alvarez asked the Board to review Diaz's personnel records, claiming there might be information showing she had had other dating relationships with superior officers. Diaz objected to release of her personnel records. The department advocate also objected. Ultimately, the Board denied his motion. The Board found his essentially oral motion was neither timely nor in compliance with applicable Evidence or Penal Codes sections.[30] The Board also found his motion lacked merit because Alvarez failed to show how this information, even if it existed, and even if true, had any bearing on the issue the Board had to decide, namely whether he had attempted to influence Diaz to testify falsely. Alvarez's failure to show the relevance and materiality of the desired information, combined with the procedural flaws, were more than adequate reasons to deny Alvarez's *Pitchess* motion.

The same is true of Alvarez's assertion he was harmed by the Board's inability to assess Diaz's credibility in the absence of the actual tape recording of Diaz's internal affairs interview. As Alvarez acknowledged at the hearing, the parties had the transcripts of Diaz's internal affairs interview. Moreover, Diaz testified before both Boards and thus its members could judge Diaz's credibility for themselves. Hearing Diaz's taped interview relaying the same information could have added little to the members' experience of witnessing her demeanor on the stand first hand.

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[30] Evidence Code section 1043 requires, at minimum, a written motion, with written notice to the governmental agency which has custody of the records, and an affidavit showing good cause for the discovery sought and its materiality to the subject matter of the pending litigation. Penal Code section 832.7, subdivision (a) states personnel records of peace officers are confidential and may not be disclosed in any criminal or civil proceeding "except by discovery pursuant to Sections 1043 . . . of the Evidence Code."

V. ALVAREZ HAS FAILED TO SHOW THE PENALTY OF TERMINATION WAS EXCESSIVE.

Because he was not found guilty of the criminal charge of suborning perjury, but only of the lesser charge of attempting to influence Diaz to testify falsely, Alvarez claims he should not have been given the same punishment of termination.

"Generally speaking, '[i]n a mandamus proceeding to review an administrative order, the determination of the penalty by the administrative body will not be disturbed unless there has been an abuse of its discretion.' [Citations.] Nevertheless, while the administrative body has a broad discretion in respect to the imposition of a penalty or discipline, 'it does not have absolute and unlimited power. It is bound to exercise legal discretion, which is, in the circumstances, judicial discretion.' [Citations.] In considering whether such abuse occurred in the context of public employee discipline, we note that the overriding consideration in these cases is the extent to which the employee's conduct resulted in, or if repeated is likely to result in, '[h]arm to the public service.' [Citations.] Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence. [Citation.]"[31]

The misconduct Alvarez engaged in presented a high risk of harm to the public service. He was deliberately dishonest before a fact-finding tribunal. He also tried to encourage another police officer to be dishonest in her sworn testimony. The matter was especially serious because he used his superior rank to try to influence a subordinate and probationary officer to commit wrongdoing instead of presenting himself as a proper role model. A characteristic for dishonesty in a police officer sworn to uphold the law presents an unacceptable risk of serious harm to the public service. The Board aptly summed up the problem in finding him guilty of the charge, stating, "the public demands integrity of a law enforcement officer and dishonesty may impair public confidence and cast suspicion upon the entire department." The fact

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[31] *Skelly v. State Personnel Bd*. (1975) 15 Cal.3d 194, 217-218.

Alvarez's attempt to suborn perjury ultimately proved unsuccessful, because Diaz refused to give the requested false testimony, does little to reduce his own culpability or to justify a lesser punishment for his own actions.

Moreover, Alvarez had a prior record of misconduct which also involved dishonesty and false testimony. His history with the department showed he had a pattern of dishonesty which was not only likely to recur, but had recurred, and would likely continue to reoccur as long as he remained on the force. In these circumstances, we cannot say the Board abused its discretion in recommending dismissal.[32]

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[32] On remand, the City issued an order simultaneously reinstating and suspending Alvarez pending the results of the second Board hearing. Based on this order of "reinstatement" Alvarez claims he is entitled to back pay from the date he was suspended to the date he was reinstated after the trial court set aside the first Board's decision to recommend termination.

Alvarez cites no relevant authority to support his claim of entitlement to back pay and benefits in this context. (Citing *Wise v. Southern Pacific Co*. (1970) 1 Cal.3d 600 [employee dismissed without "just cause" in violation of the collective bargaining agreement was entitled to reinstatement as well as back pay and the value of lost fringe benefits].) When an officer is punished without due process protections of adequate notice or an opportunity to be heard, he or she is entitled to back pay and lost benefits for the period the officer was "wrongfully" punished. (See, e.g., *Brown v. City of Los Angeles* (2002) 102 Cal.App.4th 155, 179-180 [police officer demoted without adequate due process protections was entitled to back pay from the time he was deprived of an adequate appeal hearing until the conclusion of a properly conducted appeal hearing]; *Henneberque v. City of Culver City* (1985) 172 Cal.App.3d 837, 843-844 [demoted police officer was entitled to back pay because he was deprived of the right to an administrative appeal of the demotion decision in violation of the Public Safety Officers Procedural Bill of Rights Act]; *Wilkerson v. City of Placentia* (1981) 118 Cal.App.3d 435 [officer was summarily discharged without any type of notice or opportunity to answer the charges against him. Such decision was arbitrary and capricious and the fireman was entitled to reinstatement as well as back pay and benefits during the period of his discharge].)

On the other hand, where there is no due process violation nor violation of the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.), an officer reinstated solely for the purpose of conducting a board of rights hearing is not entitled to back pay. (See, e.g., *Crupi v. City of Los Angeles, supra,* 219 Cal.App.3d 1111, 1122 [officer suspended without pay but reinstated prior to the board of rights

DISPOSITION

The judgment is affirmed.[33] Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JOHNSON, J.

We concur:

PERLUSS, P.J.

WOODS, J.

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hearing was not entitled to back pay because he failed to prove the department had violated any provision of the Public Safety Officers Procedural Bill of Rights Act].)

In the present case Alvarez does not contend he was deprived of notice or an opportunity to be heard. Nor does he allege the department violated any provision of the Public Safety Officers Procedural Bill of Rights Act in these proceedings. It appears Alvarez's reinstatement was simply a procedural mechanism to restore the status quo ante. In these particular circumstances, and the absence of evidence of due process violations, Alvarez has not established he was entitled to recover back pay on his "reinstatement." (*Crupi v. City of Los Angeles, supra*, 219 Cal.App.3d 1111, 1122 [suspended officer reinstated prior to the board of rights hearing failed to establish a violation of the Public Safety Officers Procedural Bill of Rights Act; thus, the award of back pay was *not proper*].)

[33] Because we affirm the judgment denying the writ of mandate, Alvarez has not prevailed in this action and is therefore not entitled to attorney fees under Government Code section 800 for arbitrary or capricious administrative actions, nor Code of Civil Procedure section 1021.5, for actions enforcing an important right affecting the public interest.